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# Analysis

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## Discord and Disposal of Embryos

A surprisingly near-universal comment on the judgment in *Evans v Amicus Healthcare Ltd, Hadley v Midland Fertility Services Ltd*<sup>1</sup> has been that the relevant statute law is perfectly clear. That being accepted, one has to wonder why the electronic version of the case should occupy some sixty-three pages of A4 paper and, indeed, Mr Justice Wall, who wrote the opinion, was generously apologetic on the point (at para 2). The arguments did, however, range over a wide area and, as Wall J explained, the case was considered to be not only the first major example of litigation between parties to IVF treatment in the United Kingdom, but also the first time that the consent provisions of the Human Fertilisation and Embryology Act 1990<sup>2</sup> had been subjected to major challenge by way of the Human Rights Act 1998. Moreover, as Baroness Warnock herself commented in a brief note: “This is the sort of case where the lines between law and morality become blurred.”<sup>3</sup>

This analysis, which is something by way of an interim note, asks three questions. First, does the judgment represent an unnecessarily narrow interpretation of the 1990 Act?<sup>4</sup> Secondly, given its current provisions, does the Act still reflect public opinion and public aspirations over a decade since its publication and some twenty years after its foundations were laid in the Warnock Report?<sup>5</sup> And thirdly, in the light of this, are there any changes to be made which would improve the statute?

### A. INTRODUCTION

The action, as is now well-known, was brought by two women – Ms Evans and Mrs Hadley – who had arranged for the storage of embryos derived from their own eggs and their partners’ sperm<sup>5</sup> in accordance with the 1990 Act and its attendant regulations and Code of Practice. One difference between the two cases, the significance of which will become apparent later, was that Mrs Hadley had already used three of her embryos – albeit unsuccessfully – before the current action was raised. In each case, the relationship broke up and the male partners withdrew their consents to the storage and the subsequent use of their embryos which, in effect, meant that they should be allowed to die. Although the particulars of the two claims differed in some respects, those of Ms Evans are descriptive of both and included pleas for an injunction requiring her partner to restore his consent to the storage and use of the embryos; a declaration that the embryos could be lawfully stored until the expiry of the ten-year period for which consent had been given originally; and a declaration that she could lawfully be treated with the embryos during the storage period. A further declaration of incompatibility of the 1990 Act with the Human Rights Act 1998 – by way of Arts 8, 12 and 14 of the European Convention on

1 [2003] EWHC 2161 (Fam), [2003] 4 All ER 903.

2 Henceforth “the 1990 Act”.

3 M Warnock, “Court followed the law, but is the law out of date?” *The Times*, 2 Oct 2003 at 3.

4 *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Dame Mary Warnock, chair) (Cmnd 9314: 1984).

5 Ms Hadley was married at the time the embryos were formed and Ms Evans had been through a previous, sterile marriage but, for present purposes, the precise co-habitory status of the couples is immaterial

Human Rights and of Arts 2 and 8 in respect of the embryos themselves – was also sought should it be found necessary to the case.<sup>6</sup> Finally, Ms Evans alone argued that the behaviour of her partner before and at the time of the initiation was such as to deter her from storing unfertilised eggs as an insurance against the possibility which had, in fact, arisen; this, she claimed, created a promissory estoppel sufficient to render her partner's action unconscionable (paras 12-14).

For their part, both male partners wished the embryos to be allowed to perish. They claimed that the 1990 Act gave them unequivocal and unconditional rights to withdraw their consent to storage and treatment until the moment that the individual embryo was used – and an embryo was not “used” until it was implanted in a woman. In respect of the Human Rights Act, it is sufficient to say that, in effect, they claimed that its conditions applied as much to them as to the women concerned.

It is to be noted that the action was joined by the Human Fertilisation and Embryology Authority (hereafter “the Authority”) and by the Secretary of State for Health. They contended, *inter alia*, that since the original consents depended on the parties being “treated together”, it was not open to the clinics to provide treatment once they had separated. They also maintained the absolute statutory right of the men to withdraw their consent to further storage and use of the embryos. Thus, the case effectively turned on the interpretation of the 1990 Act, Sch 3, paras 2(1) and 4.

It is important to consider just what the relevant parties consented to and, for this purpose, we can, again, refer in the main to Ms Evans' case. In respect of the clinic's requirements, Ms Evans consented to the mixing of her eggs with the sperm of her partner (para 69); at the same time, Mr Johnston acknowledged that he and Ms Evans were being treated together and that he would become the legal father of any resulting child (para 74). Both parties signed that part of the form dealing with the creation and transfer of embryos and the storage of excess embryos, although the part allowing for a choice between authorising and not authorising the storage of excess embryos was “left untouched” (para 72).<sup>7</sup> The signed form did, however, contain a statement which seems to this writer to be important in respect of Ms Evans' understanding – that is that, in the event of authorisation for storage of surplus embryos having been given, that storage would cease on receipt of a *jointly signed* request by them to discontinue storage (emphasis added).

In respect of the Authority's Form for Consent to Storage and Use of Eggs and Embryos, Ms Evans clearly consented to her eggs being fertilised and to the subsequent embryos being used in the treatment of herself with a named partner – Mr Johnston (para 79). Mr Johnston signed a comparable form and each contained the caveat: “You may vary the terms of this consent or withdraw this consent at any time except in relation to eggs or embryos which have already been used.”<sup>8</sup> There can, then, be no doubt that consent on both sides was real but was, at the same time, restricted to treatment involving them both.

Mrs Hadley's case is dealt with in far less detail in the transcript. It is essentially similar to Ms Evans' and there is little point in this short analysis in recapitulating the issues. Mrs Hadley did, however, claim that her husband had agreed to the transfer of responsibility for the embryos to her on condition that no financial or other consequences of a subsequent pregnancy would fall on him; Mr Hadley denied any such agreement (para 97).

6 [2003] 4 All ER 903.

7 Any significance of this omission is currently unclear.

8 As noted by Wall J at para 83, the caveat in the clinic's Consent Form to the effect that the storage situation would be reviewed in the event of a change in relationships is at odds with the clear statement in that of the Authority and is confusing.

## B. THE JUDGMENT

Wall J identified the two most important principles underlying the 1990 Act as involving the welfare of any children born as a result of its application and the requirements of consent by those involved to the treatments covered by the Act (para. 37).<sup>9</sup> The former was scarcely addressed but the latter were considered in great detail and in two parts.

### (1) The consent issue

#### (a) *The terms of the consent*

The first problem addressed was whether the consents given were sufficient to allow the clinic to treat Ms Evans and Mrs Hadley on their own and, unsurprisingly, the argument developed along the well-trodden track of the meaning of “treatment together” – the main issue being that this underlay the *positive* consents provided by all four parties. In this writer’s opinion, the issue in the present case is clouded by the subtle difference between the wording of the consent form as signed and that of Sch 3, para 2(1)(a). The former refers to “treatment of myself with a named *partner*”,<sup>10</sup> the latter to “that person and another specified *person* together”, a point which was also considered by the claimants’ counsel (para 127). Thus, while the first undoubtedly implies an on-going relationship, there is no such necessary implication in the second. The difference may be of little import to the conclusion of the instant case. It does, however, serve to take some of the shine off Wall J’s analysis at para 134 which is, essentially, that the concept of “treatment together” depends on the persistence of a partnership. Certainly it is generally agreed that this is the correct interpretation of the phrase as it relates to the 1990 Act, s 28(3)<sup>11</sup> but this section, concerned as it is with paternity status in the event of donor insemination, is heavily bound up with the welfare of any subsequent child. Schedule 3, para 2(1), which concerns consent, is more apt to raise the question of what is the meaning of “treatment”, as opposed to the meaning of “together”, in the phrase “treatment together”.

Wall J defined the purpose of the treatment as the creation of a pregnancy (at para 137). But is this in fact so? It seems at least arguable that the only time the treatment can be said to be together is when the eggs and the sperm are mixed; thereafter, the treatment is purely a matter for the woman concerned – a point which was recognised by the judge himself (at para 135).<sup>12</sup> It is, therefore, possible to suppose that the real consent by the men involved in *Evans and Hadley* was to the mixing of their sperm with the eggs of designated women – everything else being consequential. It is, however, hard to see this interpretation as being within the intention of Parliament and the question seems to be, at best, supererogatory to the solution of the case; moreover, the interpretation is incompatible with the case of *Re R*<sup>13</sup> in which the Court of Appeal held that the embryo must be placed in the mother at a time when treatment services are being provided for the woman and the man together.<sup>14</sup> To avoid any unnecessary confusion, the consent issue is best resolved on the incontrovertible, albeit *negative*, fact that Mr Johnston and Mr Hadley did *not* consent to the unilateral use of their embryos. The clinic would, accordingly, be in breach of their licence were they to proceed on that basis.

9 Reliance being placed on *Leeds Teaching Hospital NHS Trust v A* [2003] 1 FLR 412, per Butler-Sloss P at para 20, and *U v Centre for Reproductive Medicine* [2002] EWCA Civ 565 per Hale LJ at para 24.

10 While not wishing to be difficult, the writer has to point out that the wording in para 78 (the form) does not include the word “together” as is implied in para 107.

11 E.g. in *Re B (parentage)* [1996] 2 FLR 15; *U v W (A-G intervening)* [1997] 2 FLR 282, both of which were referred to by Wall J.

12 And which disturbed Johnson J in *Re Q (parental order)* [1996] 1 FLR 369.

13 *Re R (a child)* [2003] 2 All ER 131.

14 Per Hale LJ at para 22.

Wall J came firmly to the conclusion that, in both cases, the only consent given was for treatment together and that, insofar as he concluded that the couples were no longer being treated together, the claims failed (para 149).

*(b) Consent invalidated?*

The learned judge, however, sought a back-up position and, accordingly, considered the question of whether the embryos had already been used – a matter which particularly concerned Mrs Hadley<sup>15</sup> who, it will be remembered, had already been implanted with three of the five useable embryos produced with the aid of her husband. The significance of this lies in Sch 3, para 4(2) of the 1990 Act which holds, in précis, that a consent given cannot be varied or withdrawn once the embryo has been used in providing treatment services. Was Mr Hadley's consent invalidated thereby?

This argument was, in fact, followed in the case of both women and, although its terms must have been modified to accommodate Ms Evans' case, counsel for Mrs Hadley originally relied on the fact that the embryos would have gone through a selection process which constituted part of the treatment service. Counsel for the Authority, however, maintained that the conditions surrounding Mrs Hadley's remaining embryos and those of Ms Evans were similar. They had been created, selected as having been fertilised, frozen and stored – all of which were *preparatory* to their use, not their use.

Wall J dismissed the claimants' argument in a single paragraph (para 155). It is quite clear that to regard selection and storage as "use" of the embryo would render any regulations governing variations in consent to storage otiose. Whether this would be a good or a bad result is open to argument. For present purposes, however, such an interpretation would be obviously contrary to the spirit of the 1990 Act and the proposition is untenable.<sup>16</sup>

## **(2) Estoppel**

This is no place, nor is the writer competent, to discuss the legal niceties of a promissory estoppel which were addressed in great detail by the judge. We must, however, summarise the arguments that were involved in deciding Ms Evans' plea.

Briefly, counsel for the Secretary of State argued that the 1990 Act itself excluded the operation of any estoppel which would prevent Mr Johnson withdrawing his consent prior to the use of the embryos (para 279). There was no "property" in the embryos created and the Act embodied a conscious decision by Parliament to impose statutory regulation in this area in preference to leaving matters to be determined by contracts between individuals.<sup>17</sup> Any legal relationship involving the participants in *in vitro* treatment lay between them and the clinic rather than between each other. Moreover, he maintained that the principle that a party cannot rely on an estoppel in the face of a statute depended on the nature of the enactment; in the present case the social policy behind the 1990 Act was such as to eliminate the possibility of a waiver in favour of an individual. Counsel for Ms Evans replied to the effect that, while an estoppel could not bind the clinic, there was no public policy which prevented its application between the patients themselves.

Once again, Wall J decided firmly against the claimant, being greatly influenced by the legal difficulties which would beset the clinic if deviations from the statutory conditions of the licence

15 Ms Evans' case was included in the argument at a late stage in the proceedings.

16 The only case cited in support of the claimants was *R (Quintavalle) v Human Fertilisation and Embryology Authority* [2003] 2 FLR 335, CA – a case involving extensive manipulation of embryos. Wall J understandably dismissed this as being, at best, tangentially relevant.

17 Compare, in particular, the US case *Kass v Kass* 696 NE 2d 174 (NY, 1998) where the enforceability of a pre-conception contract was upheld.

were allowed. Any agreement between those receiving in vitro fertilisation treatment must be unenforceable unless it complies fully with the scheme (para 295). Again, however, the learned judge, having explored the principles of promissory estoppel, donned his belt to support his braces and considered the evidence, and the manner of its provision, in the actual case with reference to what he defined as the three critical elements of estoppel. In summary, he found that, despite Ms Evans' protestations, Mr Johnston had made no clear representation as to the use of the embryos, nor had he made a promise that he would never withdraw his consent to their use. Nor could the judge find it unconscionable to allow Mr Johnston to go back on his word – times had changed and there was now no bond of love between the parties. Wall J was less certain as to Ms Evans' reliance on what Mr Johnston had said in the emotional circumstances prevailing but, irrespective of this, he considered that the remainder of the evidence was sufficient to adjudge that there was no effective estoppel in the case (para 310).

This analysis is, perhaps, unreasonably over-concerned with Ms Evans' plea of estoppel. The author feels, however, that it lies at the root of the dissatisfaction with the result of the case that has been expressed in at least a substantial minority of commentaries in the media. It is trite to observe that only the judge has heard the witnesses and observed their body language. It is well-nigh impossible to criticise his extensive analysis and conclusions – and his apologia for the men involved (at para 319) is to be noted. Nevertheless, if Ms Evans' description of her discussion with Mr Johnston as to the possibility of their relationship splitting up is correct,<sup>18</sup> she could well be excused if she interpreted the words as implying more than companionable reassurances. One cannot but intuitively question whether a law which positively, albeit coincidentally, encourages what might well be less than honourable conduct is a good law and this, in the writer's view, remains one of the less satisfactory outcomes of the case as it stands.

### (3) The human rights dimension

Wall J found the language and purpose of the 1990 Act to be so clear as to be incapable of more than one interpretation; he, therefore, regarded the compatibility of the Act with the terms of the Human Rights Act 1998 as constituting the most important part of his judgment. While this is a doubtful assessment in terms of pleadings under Arts 2, 12 and 14, it is certainly true in respect of Art 8 which encompasses many of the arguments developed elsewhere in the case.

#### (a) Article 2: *The right to life*<sup>19</sup>

Article 2 states that: "Everyone's right to life shall be protected by law". It was argued on behalf of Ms Evans' and Mrs Hadley' embryos that this included an embryonic right to continue in being as long as one of the gamete producers so wished, and a right to be kept available for implantation if their mothers so wished. The issue then turns on the definition of "everyone" or, more simply, on the "personhood" of the embryo.

In summary, Wall J reviewed, and agreed with, the existing authorities<sup>20</sup> which consistently deny the concept of unborn fetal personhood and, consequently, deny any rights of personhood to the fetus. "If the fetus has no right to life," said the judge, "it is difficult to see how an embryo can have such a right" (at para 175)<sup>21</sup> – and, in passing, it is worth remembering that, were such

18 "He told me again that we would not be splitting up, that our future was together and that he loved me....He told me that he would never leave me and that he wanted to be the father of my children" (para 24).

19 The text of the various Articles is to be found in Sch 1, Part I of the 1998 Act.

20 To which can be added *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245, HL, which is the nearest the courts have ever come to according such rights without, however, doing so.

21 Although, given the very different legal attitudes to, say, paternal rights in respect of fetuses and embryos, this may be over-simplistic.

a right to exist, the whole IVF programme, which necessarily involves the production of surplus embryos, would come to a halt. There are, of course, many who would applaud this result, and Wall J was at pains to emphasise that he did not regard the fate of embryos created by IVF as insignificant – indeed, he regarded it as a most important question. It was simply that Art 2 was the wrong medium through which to address the question.

*(b) Article 12: The right to marry and to found a family*

Wall J dismissed discussion of Art 12 peremptorily and realistically, in that it was agreed that there were no arguments to be made under Art 12 independently of those related to Art 8. Significantly, he declined to consider the two limbs of the article disjunctively<sup>22</sup> – a right to found a family through IVF was no more than a right to IVF treatment and even that, if it existed at all, was a qualified right.

*(c) Article 14: Prohibition of discrimination*

This article was not argued on the grounds of sex discrimination but, rather, on the basis of disability. Essentially, it was submitted that the woman was undergoing IVF by reason of disability and there was no justification for the particular difference in treatment between the woman who conceived naturally and she who was receiving IVF that was the subject of complaint in the present case – in other words, there was no justification for conferring a power to withdraw consent to implantation on the male partner in the latter group. Counsel for the Secretary of State, however, held that the relevant comparative groups were women who were pregnant by natural means and those who were pregnant by assisted means – and, once pregnant, all women have the same control of their situation. Schedule 3 did not distinguish between women on the grounds of disability. It distinguished between men and women whose partners changed their minds about undergoing IVF treatment, on the one hand, before and, on the other, after the use of an embryo. Irrespective of this, the fact that a woman who is disabled may suffer adversely as a result of the provisions of the Act does not mean that she has been discriminated against on the grounds of her disability (para 275). As would be anticipated, Wall J preferred the Secretary of State's argument.

*(d) Article 8: The right to respect for private and family life*

Wall J found the question of whether or not the existing requirements of Sch 3 were compatible with Art 8 to be less than straightforward. It is some indication of the complexities of the issue that it took some eighty paragraphs to reach the conclusion that any interference from the State embodied in the 1990 Act that could be identified as coming within Art 8 was necessary for the protection of the freedom of others and was, in the circumstances, entirely proportionate; accordingly, there was no breach of Art 8 (para 259).

Even so, this conclusion accepts that the Schedule *does* interfere with a right to respect for private lives. The difficulty facing the claimants in this case was, however, that the interference is bilateral in that it also involves their former partners; moreover, it was accepted by all the parties that some State-imposed restrictions on the practice of assisted reproduction was legitimate and, indeed, necessary.<sup>23</sup> The question then becomes a matter of whether what counsel for the claimants called the “male veto” constitutes a disproportionate interference in favour of the men and whether it is a *necessary* interference. The argument countering that of

22 For a discussion of Art 12 and the surrounding jurisprudence, see G T Laurie “Medical law and human rights: passing the parcel back to the profession?”, in A Boyle, C Himsworth, A Loux and H McQueen (eds), *Human Rights and Scots Law* (2002), ch 12, esp 257-8.

23 It is to be noted that this would not necessarily hold in, say, the United States where the rights culture is based on different premises.



the claimants is, of course, that the 1990 Act treats male and female gamete providers equally and provides a veto for both (para 246) – in other words it assumes that the reproductive process is gender neutral. The problem for this writer is that this is, in physiological terms, simply not so. We do, however, return to the point later in the paper.

Out of a host of other aspects of the case that were argued, perhaps the most important related to the “primacy of consent” and the nature of consent. Counsel for the claimants maintained that true consent meant consent on the terms the consenting party wished (para 201). Put in another way, the objection to Sch 3 lay in its rigidity and its failure to respond to special cases – of which Ms Evans’ case was a prime example; in short, it was the disproportionality introduced by the absolute nature of Sch 3 that offended against Art 8. One fancies that it is this particular facet of the case which tipped “popular” opinion in favour of Ms Evans.

Against this, it was argued powerfully that, in making a rule, it is desirable that a “bright line” is drawn between what is within or without that rule rather than that such a decision should depend on the facts of the individual case. Where that line is drawn is immaterial – the essential element is that it should be clear and not subject to ad hoc variation based on special pleading (para 241). This, counsel for the Secretary of State maintained, was fundamental to the intentions of Parliament and it is suggested that it was this argument which influenced Wall J most in reaching his decision. This, he said, was a sensitive area of the law in which it is for Parliament to legislate: “It is an area in which the courts have only a limited role to play” (para 254).

Nevertheless, one can still question the seemingly incontestable dominance now attributed to the “primacy of consent”. Certainly consent provides us with a clear rule but, as *Evans and Hadley* shows us, it can lead us into stalemate. There are other “bright lines” and this near-heretical suggestion is discussed further below.

### C. PUBLIC OPINION AND THE 1990 ACT

Litigation in respect of the 1990 Act appears to be taking on a shape of its own. The pattern is as follows. A new problem arises, generally as a result of expanding medical technology. The court of first instance decides the issue by strict reference to the wording of the statute, which makes for consistent law but which fails to satisfy those who seek to harmonise current legal and medical practice. Confronted with this impasse, the higher courts manage, using varying degrees of legal legerdemain, to interpret the law so as to modernise the Act yet leave its substance unchanged. The classic recent examples concerned cases involving the use of cloning techniques<sup>24</sup> and tissue typing for the benefit of siblings.<sup>25</sup> Permission to appeal has been refused in *Evans and Hadley* though it may yet proceed and this leaves open the possibility of a further review which might help dispel some of the vague unease that currently attends the case. Much of this relates to divided sympathy for the woman who wants a child and for the man who must accept parental responsibility for that child.

A rights-based discourse sets up, but does not resolve, such a conflict and we have already discussed, even if only in summary fashion, the difficulties facing the courts as expressed by Mr Justice Wall. It may be that a solution to Ms Evans’ and Mrs Hadley’s problem is only to be found in a change in the law. Public opinion is a fickle indicator and care must be taken not to follow it along the line to where “hard cases make bad law”. Nevertheless, it may be useful to explore the possibilities.

<sup>24</sup> *R (on the application of Quintavalle) v Secretary of State for Health* [2003] 2 All ER 113, HL.

<sup>25</sup> *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2003] 3 All ER 257 CA.



### D. A CHANGE IN THE LAW?

It is easy to say, as has been the general response to the case thus far, that, given that two persons have been involved in the production of an embryo, it is only right that they ought to be involved in deciding how it should be used. But equity, then, surely demands that the same two persons should decide together that it should be allowed to perish.<sup>26</sup> Indeed, equity aside, there are practical reasons why destruction should not be within the remit of one of the parties to the formation of the embryo. Ms Evans could well plead that the law might change before destruction was authorised under the compulsory timeous regulations<sup>27</sup> – and ten years is a long time in terms of medical law and ethics.

#### (1) Property in the embryo?

We are, admittedly, then left with a head-to-head situation involving two irreconcilable demands – “I still want to be a mother” vs “I don’t now want to be a father” – and the legal solution provided by *Evans and Hadley* is to stand the judgment of Solomon on its head and to do away with the child in waiting. Which cannot be good<sup>28</sup> and which, instinctively, reflects poorly on the resilience and innovativeness of the legal system. Baroness Warnock said of her original Committee of Inquiry: “we did not envisage such a case – and I think we were at fault there”.<sup>29</sup> The time might be ripe to rectify the position.

One possible answer would be to place the decision as to the ultimate disposal of the embryo in the hands of the person for whose use it was intended – that is, the woman involved.<sup>30</sup> It will, of course, be said that this is unfair to the male progenitor and is sex-discriminatory. Equally, one can respond that to claim that responsibility for the embryo is gender-neutral is simply to distort the facts in the guise of political correctness. There are, in fact, good pragmatic reasons why it is positively right to vest the woman with a form of property rights in her embryo. In the first place, she has done much more to produce the embryo than has the man – IVF treatment provides no easy road for the would-be mother. Secondly, the woman is solely responsible for the hoped-for metamorphosis from embryo to fetus to neonate. And, at the end of the day, motherhood and fatherhood are states of very different dimensions – albeit not always so in terms of legal responsibility.

There was much allusion in the course of the trial to the importance of the position of the unborn child and, undoubtedly, this solution can only result in the births of fatherless children. It is doubtful, however, if this is fatal to the proposal. Legally speaking, s 13(5) of the 1990 Act, in saying that “a woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born...(including the need of that child for a father)”, is little more than advisory. Parliament leaves the conclusions resulting from any account-taking to the judgment of the individual clinic.<sup>31</sup> Socially, it is a trite observation that many fatherless families subsist very adequately in the modern welfare state. The author would be the last to decry the merits of the traditional family but they are not over-arching – and the

26 The wording of the Act which is clearly a euphemism for destroy. It is used in order to obviate any argument as to “omission” and “commission” in relation to the deaths of embryos. See, in particular, *Airedale National Health Service Trust v Bland* [1993] AC 789, HL.

27 Human Fertilisation and Embryology (Statutory Period for Embryos) Regulations 1996, SI 1996/375.

28 It does, of course, offend the not inconsiderable minority who regard the embryo as exhibiting full human life.

29 *Cutting Edge: Battle for a Baby*, 2 Oct 2003, Channel 4. From P Hoggart, *The Times*, 3 Oct 2003, T2 at 22.

30 The author is already party to this proposal. See J K Mason, R A McCall Smith and G T Laurie, *Law and Medical Ethics*, 6th edn (2002), paras 3.67 and 15.7.

31 Which tends to diminish the importance of the “bright line” rule sought by counsel for the defendants.

mere existence of ss 13(5) and 25(2) of the 1990 Act indicates that single-parent families are legally acceptable.

## (2) Protection of the man

Such a change could not, however, be effected in isolation – the rights of the man, and particularly his right not to be forced into unreasonable financial responsibility,<sup>32</sup> would require protection. The simple answer to this would be to confer the same immunity on the man who withdraws his consent to the use of his embryos as is granted to the semen donor.<sup>33</sup> His only losses, then, if they can be described as losses, are intangible – including, say, loss of his genetic individualism and the erosion of his freedom to choose. Such a solution to the *Evans and Hadley* dilemma is, therefore, admittedly not perfect – for example, the gamete donor is *not* anonymous and, as a result, it may be difficult for him to come to terms with the *moral* position of being a father<sup>34</sup> – but perfection within the particular scenario of this case, whether the law subsists or is changed, is probably unattainable. It is suggested that the defects of the suggested system represent a relatively small price to pay for the alleviation of suffering of infertile women such as Ms Evans and Mrs Hadley for whom the overwhelming majority of the public had great sympathy. And the faults are surely less palpable than are those attached to the only currently viable alternative – the use of anonymous donors by women in the Evans/Hadley situation. Encouragement of such a charade could not possibly be in the public interest. Indeed, one might wonder whether the clinic could be assured that the couple embarking on such a course were “suitable” for treatment.<sup>35</sup>

## E. CONCLUSION

This analysis indicates that the law as it stands is perfectly clear<sup>36</sup> and that, with the possible exception of considerations under Art 8, Wall J had no realistic alternative to dismissing the claims of Ms Evans and Mrs Hadley – further than this, the very clearly expressed judgment indicates that he was *positively* right to do so. This apparent clarity undoubtedly explains his refusal of leave to appeal.<sup>37</sup>

Nonetheless, there is an intuitive public empathy for Ms Evans and Mrs Hadley which this writer feels should be met if it is possible to do so. We have noted the tendency for first instance decisions on the 1990 Act to be reversed on appeal but, as Wall J intimated, judicial options on this score are running out. In particular, the Parliamentary intention demonstrated in the 1990 Act, Sch 3 seems so obvious as to preclude the possibility of a purposive reinterpretation of the Act such as was adopted in *Quintavalle*.<sup>38</sup> As Wall J said, and as already noted: “This is pre-eminently an area in which it is for Parliament to legislate”(para 249).

32 By way of the Child Support Act 1991, s 1.

33 1990 Act, s 28(6).

34 There may have been, in fact, some discussion as to whether Mr Hadley might assume the role of an anonymous donor (para 97).

35 See HFEA *Code of Practice*, 5th edn (2001), para 3.13. The evidence of one of the clinic’s nurses at para 53/24 is revealing in this respect. See also Wall J at para 308. The possibility that this course might have been adopted by Ms Evans was raised in her amended particulars of claim (para 13/7).

36 It might be argued that it discriminates against women but it is patently obvious that a woman could equally refuse to use an embryo were her partner striving to become a father. There can never be a “right” to procreate.

37 It is, of course, well-known that he put a stay on allowing the embryos to die pending an appeal against his decision.

38 Note 24 above, in which, see Lord Bingham at para 8, quoted by Wall J at para 18.

As a consequence, possible changes in the law have been suggested above which could fill the vacuum noted by Baroness Warnock.<sup>39</sup> It is thought that these would satisfy unfortunate women in situations like the present and, given that an ideal solution is impossible, they would be fair to the men concerned. They offer no mortal offence to the doctrine of consent<sup>40</sup> which, in fact, they maintain – all that is required to bring the suggested changes about is an amending paragraph in Sch 3 setting out what would be the precise consensual requirements in the new conditions.

And, as a final endorsement, they would save embryonic life. This analysis has, thus far, taken little cognisance of this aspect of the case, largely in order to avoid the emotive consequences of so doing. The law is, however, committed to the preservation of human life and, no matter what importance, or lack of importance, the individual places on pre-natal existence, no-one can deny that the embryo represents a form of human life deserving, as the Warnock Committee had it, of some respect and protection in law.<sup>41</sup> Reform of the law that included recognition of this would satisfy the considerable pro-life lobby in the United Kingdom without reopening debate in the area – and, at the same time, King Solomon would be restored to his rightful place.

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## *Bellinger v Bellinger*, the House of Lords and the Gender Recognition Bill

### A. INTRODUCTION

On 11 July 2003, the UK Government published a Draft Gender Recognition Bill which it hopes will become law during the 2003-04 Parliamentary session.<sup>1</sup> This was its response to the decision in *Goodwin v United Kingdom*,<sup>2</sup> in which the European Court of Human Rights, one year to the day earlier, had held that the English law on transsexuals, as set out in *Corbett v Corbett*,<sup>3</sup> was contrary to both Art 8 and Art 12 of the European Convention on Human Rights. That such a response was required was confirmed in April 2003 when the House of Lords published its

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39 Note 29 above.

40 Which, it may be said, is neither sacrosanct nor a panacea for all dilemmas. See, in general, O O'Neill, *Autonomy and Trust in Bioethics* (2002).

41 Note 4 above at para 11.17.

1 The Gender Recognition Bill was presented to the House of Lords on 27 November 2003. Unlike the July draft it contains clauses extending its provisions to Scotland.

2 (2002) 35 EHRR 18. See also *I v UK* (2003) 36 EHRR 53 and, more recently, *Van Kuck v Germany*, 12 June 2003.

3 [1971] P 83.